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ALEXANDER L. STEVAS,
CLERK

No. 84-620

In The
Supreme Court of the United States
October Term, 1984

NEW JERSEY-PHILADELPHIA PRESBYTERY OF THE BIBLE PRESBYTERIAN CHURCH, et al.,

Petitioners,

v.

NEW JERSEY STATE BOARD OF HIGHER EDUCATION, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

Does Shelton College have the right, under the Free Exercise Clause or Establishment Clause of the First Amendment to the Constitution of the United States, to issue bachelor's degrees without demonstrating its ability to meet minimum standards of higher education, as required by New Jersey's higher education statutes and regulations?

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COUNTERSTATEMENT OF THE CASE

This case involves a claim by petitioners that New Jersey's higher education statutes and regulations violate the Religion Clauses of the First Amendment by prohibiting Shelton College from issuing bachelor's degrees in New Jersey without a license from the New Jersey Board of Higher Education.

A. The Parties

Shelton College is an institution whose avowed purpose is "to establish a liberal arts college to be operated in harmony with conservative American principles and the historical conviction that the Bible is the Word of God, and to offer such degrees as may be granted by liberal arts colleges." (Shelton College Handbook, Exhibit S-21, at 9.) All courses at Shelton are taught from a fundamentalist Christian viewpoint, but its curriculum includes a wide range of traditional college courses such as accounting, psychology, Spanish, and Modern British Literature. Shelton offers degree programs in, among other things, Biblical Literature, Business Administration, Elementary Education, English and Natural Science (A29). Shelton graduates engage in all manner of occupations, and include teachers, lawyers, and businessmen, as well as ministers.

The New Jersey Board of Higher Education ("the Board") is the regulatory body charged by statute with jurisdiction over degree-issuing institutions of higher education operating in New Jersey. N.J.S.A. 18A:3-13 (A200). Among the duties of the Board is the licensure of private degree-issuing institutions. N.J.S.A. 18A:3-14 (m) (A202). Under the Board's licensure system, a school

seeking to issue degrees in New Jersey must file a petition with the Board that provides specified information about the school in the following categories: institutional purpose; administrative organization; finances; education programs; faculty; library; student body; and physical facilities (A110-A125). After the filing of a licensure petition, the Board and the school choose, by mutual agreement, a team of consultants to evaluate the school. The consultants prepare a report on the school, with their recommendations as to the school's fitness for licensure.* The petition and consultants' report then go through several layers of review and comment, at the conclusion of which the Board determines whether the institution should be granted a license. Assuming that a license is granted, the usual period of licensure is five years, during which the Board does not generally engage in any further monitoring or "spot checks" of the institution.

B. Background and Procedural History

For some years prior to 1965, Shelton operated in New Jersey as a licensed institution under the statutes and regulations it challenges here. In 1965, after the Board commenced administrative proceedings to determine whether Shelton was failing to maintain minimum educational standards, Shelton instituted suit in state court challenging the constitutionality of the licensing statutes

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* In order to ensure flexibility and avoid the imposition of rigid, prescriptive standards, each institution is evaluated on the basis of its own stated purpose. N.J.A.C. 9:1-1.2. In further recognition of the need for educational diversity and academic freedom, neither the Board nor its consultants engage in any review of the content of course offerings (A44). Review of course content, indeed, is prohibited by the statute. N.J.S.A. 18A:3-14(e) (A202).

and regulations. This challenge was rejected by a unanimous Supreme Court of New Jersey. *See, Shelton College v. State Board of Education,* 48 N.J. 501, 226 A.2d 612 (1967). The Board thereafter revoked Shelton's license to issue degrees, prompting Shelton to move its campus to Cape Canaveral, Florida, where it operated until at least 1981 as a licensed educational institution under that state's licensing statutes and regulations (A178).

In February 1979, Shelton submitted a petition for a new license to issue degrees in New Jersey. After a preliminary review of the petition for completeness, the Board asked Shelton to supplement it with several particulars. Because of Shelton's failure to provide these materials, processing of the petition was never completed. Nonetheless, in the fall of 1979, Shelton re-commenced college operations in Cape May, New Jersey.

On November 15, 1979, the Board filed suit in state court and obtained a temporary restraining order requiring Shelton to cease operations in New Jersey until it had obtained a license from the Board. On November 19, 1979, Shelton filed suit in federal court, again challenging the constitutionality of the State's higher education statutes and regulations. On January 4, 1980, following two days of hearings, the federal court issued a preliminary injunction against enforcement of those portions of the state court restraining order purporting to prohibit the conduct of teaching or religious activities at Shelton. As to all other issues, and particularly as to the constitutionality of the State's licensure scheme as applied to Shelton's degree-granting functions, the District Court abstained and remanded the matter back to state court (A169-A199).

The case then proceeded to trial in state court. On November 10, 1980, the trial court issued a 32-page decision upholding the constitutionality of the State's statutes and regulations. Specifically, the trial court held that the licensure regulations did not directly infringe on any religious beliefs or practices of Shelton, that any indirect infringement was outweighed by the State's interest in preserving the integrity of the baccalaureate through enforcement of minimum standards of higher education, and that the regulations did not excessively entangle the State in Shelton's religious affairs (A50-A51). A final order enjoining Shelton from issuing any bachelor's degrees until it obtained a license from the Board was entered on December 10, 1980 (A51).

The matter then shifted back to federal court, where both sides had appealed from the District Court's order of January 4, 1980. On April 14, 1981, the Court of Appeals for the Third Circuit, in a 2-1 opinion, affirmed the District Court's preliminary injunction of the state court proceedings (A70-A125). The central holding of the majority opinion was that the federal action was not barred by the abstention doctrine of *Younger v. Harris*, 401 U.S. 37 (1971). According to the majority opinion, *Younger* did not apply because certain of the federal plaintiffs were not parties to the state court proceedings and were asserting "independent" constitutional claims in the federal action. Judge Rosenn filed a concurring opinion in which he took pointed exception to the majority's *Younger* analysis, but agreed with the District Court that portions of the state court restraining order well within the "great and immediate harm" exception to the *Younger* rule (A126-A160).

Thereafter, on May 18, 1981, the District Court issued a second preliminary injunction prohibiting the Board from enforcing the state trial court's final order until review of the matter by the state appellate courts was complete (A47-A69). The District Court found that plaintiffs were likely to prevail on the merits of their claim that New Jersey's licensure regulations violated Shelton's free exercise rights, and were therefore entitled to this interim relief.

In order to expedite the completion of appellate review in state court, both parties moved for direct certification of the matter to the New Jersey Supreme Court. On August 9, 1982, that court affirmed the trial court's decision (A26-A46). The New Jersey Supreme Court held that the licensure statutes were intended to apply to all colleges, including religious ones like Shelton, that the State's overriding interest in maintaining minimum educational standards at degree-issuing institutions outweighed any infringement of Shelton's free exercise of religion, and that the regulatory scheme did not, on its face, excessively entangle the State with religion. In the interest of equity, the Supreme Court modified the trial court's final order to give Shelton a two-year grace period in which it could grant degrees to all students in the classes of 1983 and 1984.

Shelton did not seek review of the New Jersey Supreme Court's decision by this Court at that time, but rather sought to have the matter re-heard by the District Court. Over the Board's objection that the federal court was barred by *res judicata* and *Younger v. Harris* from granting any relief to Shelton, the case was re-tried on January

17, 1983.* At the federal "trial," Shelton relied entirely on the transcript and exhibits of the state court trial, except that it again called Russell Kirk, an expert in higher education who had previously testified for Shelton at the state trial, and who now gave his opinion on the supposed errors in the New Jersey Supreme Court's decision.

On July 29, 1983, the District Court issued its final decision, holding that New Jersey's higher education statutes and regulations, as definitively interpreted by the New Jersey Supreme Court, did not violate Shelton's rights under the Religion Clauses of the First Amendment. An order dismissing Shelton's complaint was entered September 26, 1983 (A7-A25).

Shelton appealed the District Court's decision on October 24, 1983. On July 17, 1984, the Third Circuit affirmed. The Third Circuit adopted the reasoning and opinion of the District Court (A5), and thus concluded that:

1. "Shelton College did litigate its federal claim in the state courts without reservation" (A16);

2. The religious beliefs of the Bible Presbyterian Church do not forbid its members from applying for state licensure of Shelton College (A17);

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* Immediately before the federal court trial, the District Court granted Shelton's motion for joinder of seven Shelton underclassmen as plaintiffs in the federal suit. This maneuver lent substance to Judge Rosenn's observation in his concurrence that, under the Third Circuit's ruling on the *Younger* issue in this case, "future state court defendants whose federal injunctive suits are barred by *Younger* need only add to their federal complaint new parties who have separate interests, in order to obtain exactly the same relief that *Younger* would otherwise bar." (A132).

3. The New Jersey Supreme Court's construction of the licensure regulations, which recognizes that the regulations do not authorize the Board to regulate the content of Shelton's educational programs or to pass on the validity of its religious purposes, serves to limit the Board's powers to constitutionally permissible boundaries (A14; A15);

4. The State has a compelling interest in "maintaining the quality of higher education and the degrees evidencing attainment of such education" (A19);

5. The State's ability to protect its compelling interest "in preventing the impairment of minimum standards for the granting of degrees" would be severely jeopardized by absolute exemption of religious schools from licensure requirements (A19-A20);

6. The burdens imposed upon Shelton College by the requirement that it apply for a license if it wishes to issue bachelor's degrees are not undue (A20); and

7. The licensure regulations, as construed by the New Jersey Supreme Court, do not, on their face, excessively entangle the State with religion (A21).

Shelton's petition for a writ of certiorari was filed on October 15, 1984.

ARGUMENT

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE SHELTON'S CLAIM OF RELIGIOUS INFRINGEMENT IS WITHOUT MERIT.

A. The Licensure Statutes and Regulations Do Not Inhibit Petitioner's Free Exercise of Religion.

Reduced to its essence, petitioners' principal argument in this case is that the Free Exercise Clause of the

First Amendment gives Shelton College an absolute right not only to practice its religion but to grant bachelor's degrees. This attempted assertion of a religious "right to issue bachelor's degrees" fails at the threshold because the issuance of bachelor's degrees is not a religious function or practice of the school. To the contrary, the record makes clear that the reason Shelton seeks to bestow upon its students the recognized secular degree of baccalaureate is that the degree will enable the school's graduates to go on and enter all walks of society. Since the licensure statutes only require Shelton to obtain a license if it wishes to engage in the non-religious activity of issuing degrees, and otherwise leave the school entirely free to propagate its religious beliefs, petitioners are unable to demonstrate that the statutes have any coercive impact on their practice of religion. *Abington School District v. Schempp*, 374 U.S. 203, 223 (1963).

Petitioners seek to overcome this initial hurdle by arguing that the loss of degree-issuing capacity would be a fatal blow to the school and thus acts as a "coercion" upon Shelton to seek licensure. This argument is unavailing, however, because petitioners have failed to show how compliance with the licensure regulations would interfere with the practice of religion at Shelton. At most, petitioners have shown that Shelton is a strongly religious school, and that, for that reason alone, it does not feel that it should have to obtain a state license to issue degrees. While petitioners contend that licensure will result in the State's total dominion over the college, nothing in the record supports this view. The regulations require only that Shelton provide the Board with information sufficient to assess the educational competency of the school;

they in no way limit Shelton's ability to teach its religious doctrines to its students (A45). Consequently, whether or not Shelton chooses to seek licensure, the licensure statutes cannot be said to impair Shelton's free exercise of religion. *See, State ex rel. McLemore v. Clarksville School of Theology,* 636 S.W.2d 706 (Tenn. 1982) (holding that licensure statutes similar to New Jersey's impose no burden on the practice of religion because issuance of degrees is not a religious function).

Petitioners have likewise failed to point out any error in the conclusion reached by all four courts below that the State's compelling interest in maintaining minimum standards of higher education outweighs any indirect burden that the licensure statutes may place on the practice of religion at Shelton. The record here amply supports the observations first made by the New Jersey Supreme Court in *Shelton College v. State Board of Education,* 48 N.J. 501, 226 A.2d 612 (1967), regarding the State's interest in preserving the integrity of the bachelor's degree:

> [T]he degree, evidential as it is of academic attainment, [is] especially an appropriate object of regulation . . . "The power to confer academic degrees is to be regarded as distinct and separate from the privilege of being incorporated as an educational institution. The privilege of granting degrees is very intimately related to the public welfare, and is unquestionably subject to regulation by the State." [48 N.J. at 511, quoting Elliott, *The Colleges and the Courts* (1936), p. 200.]

As the New Jersey Supreme Court further noted in its first *Shelton College* opinion, "the power to grant degrees has traditionally been deemed to depend on legislative grant in New Jersey." 48 N.J. at 510. The public interest

in the degree is manifested by the fact that "government and private segments of our society look to the degree for evidence of [an individual's] achievement and capacity." 48 N.J. at 513. This interest, which has led to State enforcement of minimum standards of higher education in most western democracies (48 N.J. at 510), grows stronger with time, as the world becomes more technologically complex:

> The public stake in education has never been more evident, for today higher education is essential for the survival of man himself. The academic degree is the more meaningful on that account. [48 N.J. at 515]

The decisions of this Court are replete with statements acknowledging the fundamental nature of the State's interest in the education of its citizenry. *E.g., Trustees of Dartmouth College v. Woodward,* 4 Wheat. 518, 634 (1819) ("That education is an object of national concern, and a proper object of legislation, all admit"). Indeed, this Court has on a number of occasions specifically used the State's interest in maintaining minimum educational standards as a benchmark for assessing the legitimacy of challenged State activities in the educational field. Thus, in *Board of Education v. Allen,* 392 U.S. 236 (1968), where the Court upheld a New York statute requiring public school authorities to lend textbooks free of charge to parochial school students, it was noted that

> a substantial body of case law has confirmed the power of the State to insist that . . . private schools . . . provide minimum hours of instruction, employ teachers of specified training, and cover prescribed subjects of instruction . . . [T]he State . . . has a proper interest in the manner in which [private] schools perform their secular educational function. [392 U.S. at 295-297.]

See also, Lemon v. Kurtzman, 403 U.S. 602, 613 (1971) ("a state always has a legitimate concern for maintaining minimum standards in all schools it allows to operate").

There can thus be no serious dispute over whether the educational concerns behind the licensure statutes represent a compelling State interest. Petitioners argue, however, that the State's interest in protecting the integrity of the bachelor's degree is attenuated by the fact that the value of such degrees already varies widely from school to school (Petition at 9-10). This argument is misdirected insofar as the purpose of the State's licensure system is not to create absolute uniformity in the quality of education offered at different institutions, but rather to insure that all degree-issuing institutions meet minimum standards of higher education. The District Court laid bare the logical flaw in petitioners' argument, moreover, stating, "Even though the imposition of licensing requirements has not assured uniformly high quality education in all institutions of higher learning, the State is certainly justified in pursuing that goal." (A19).

Equally unfounded is Shelton's contention that, because of the school's supposedly unique religious nature, the outcome of this case will not "have wide impact upon similar parties." Petition at 7. Clearly, a religion-based exception to the licensure statutes would, in the words of the New Jersey Supreme Court, "cut to the heart of the legislation and severely impede the achievement of important State goals." (A42). In New Jersey, as elsewhere,*

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* The consequences of a licensure exemption for religious schools like Shelton would be felt far beyond New Jersey. A 1975 survey found that, in addition to New Jersey, the follow-

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"[r]eligious oriented colleges and universities comprise a significant proportion of the institutions of higher learning." (A34-A35). It is a documented fact, moreover, that a common practice of diploma mills is to use names suggesting religious affiliation. *See,* Minnery, "Shortcut Graduate Degrees Shortchange Everybody," *Christianity Today* (May 29, 1981, Vol. XXV, No. 10, p. 26). Because carving out a religious exception to the State's licensure requirements would effectively destroy the legislative scheme, no "less restrictive means" of protecting the State's interest can be said to exist, and the balance of individual burdens against public interest tilts heavily in the State's favor. *See, e.g., United States v. Lee,* 455 U.S. 252, 259-60 (1982).

The New Jersey Superior Court, the New Jersey Supreme Court, the District Court, and the Court of Appeals for the Third Circuit were therefore correct in rejecting Shelton's free exercise claim. As the New Jersey Supreme Court has noted, higher education plays a larger, more important role in our society and economy every day. The

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ing states all engage in some form of licensure of degree-issuing schools: Alaska, Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Illinois, Indiana, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Mexico, New York, Oklahoma, Ohio, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Vermont, Virginia, West Virginia and Wyoming. *Approaches to State-Licensing of Private Degree-Granting Institutions: The Airlie Conference Report,* IEL Reports: Eight (George Washington University Press November 1975). Of the above states, the regulatory schemes of at least Alaska, Connecticut, District of Columbia, Florida, Georgia, Maryland, Massachusetts, New York, Pennsylvania, and Rhode Island would appear to be substantially similar to New Jersey's.

bachelor's degree is, so to speak, the universal currency of higher education, and the State has an overriding interest in seeing that that currency is not devalued by counterfeiters or incompetent bankers. The necessary and relatively minor burdens that the licensure regulations impose on Shelton by way of disclosure and compliance with minimum educational standards—which burdens have not been shown to inhibit the free exercise of Shelton's religious beliefs in any respect—are more than justified by this interest. Further review of this question by this Court is accordingly not warranted.

B. The Licensure Statutes and Regulations Do Not Excessively Entangle the Board With Shelton's Religious Affairs.

Petitioners' argument that the State's licensure statutes and regulations violate the Establishment Clause of the First Amendment by excessively entangling the Board in Shelton's religious affairs is likewise lacking in merit. That the licensure regulations do not thrust the Board into the "kind of continuing day-to-day relationship which the policy of neutrality seeks to minimize," *Walz v. Tax Commission of New York*, 397 U.S. 664, 674 (1970), is perhaps best demonstrated by the fact that the usual period of licensure for a school is five years. A quintennial review by the Board to determine whether an institution is meeting educational standards hardly constitutes the type of "comprehensive, discriminating, and continuing state surveillance" that the Establishment Clause prohibits. *Lemon v. Kurtzman*, 403 U.S. 602, 619 (1971).

Indeed, in *Roemer v. Maryland Public Works Bd.*, 426 U.S. 736 (1976), the Court rejected a claim of excessive entanglement on grounds that would unquestionably

dispose of petitioners' claim here. In *Roemer,* the Court upheld Maryland statutes and regulations providing for annual grants to state-accredited private colleges, including religious colleges. The Court recognized that because the statutes required each college to file an annual report demonstrating that the funds were not being used for sectarian purposes, the State would have to make "annual decisions . . . as to what is a 'sectarian purpose'," and that "[o]ccasional audits" would be necessary for verification, 426 U.S. at 763-64. These "entanglements" were held to be within constitutional bounds because the "contacts between the [State] and the colleges were not likely to be any more entangling than the *inspections and audits incident to the normal process of the colleges' accreditation by the State.*" 426 U.S. at 764 (plurality opinion; emphasis added). Given the substantial similarity between Maryland's accreditation regulations and New Jersey's *(compare,* Md. Admin. Code, Tit. 13, § 50.04.01 *et seq.* and N.J. A.C. 9:1-1.1 *et seq.*), the Court's implicit approval of the Maryland licensure scheme has direct applicability to this case.

Petitioners' excessive entanglement argument also fails because, as both the New Jersey Supreme Court and District Court have noted (A21; A45), it rests on unsupported speculation about the manner in which the Board will administer its regulations during the licensure process. Again in *Roemer v. Maryland Public Works Bd., supra,* 426 U.S. at 760-61, it was stated,

> It is to be expected that the [Department] will give a wide berth to "specific religious activity," and thus minimize constitutional questions. Should such questions arise, the courts will consider them. It has not been the court's practice, in considering facial chal-

> lenges to statutes of this kind, to strike them down in anticipation that particular applications may result in unconstitutional [action]. [Footnote omitted.]

See also, Committee for Public Education and Religious Liberty v. Regan, 444 U.S. 646, 660-61 (1980) ("we are not prepared to read into the plan as an inevitability the bad faith upon which any future excessive entanglement would be predicated").

The District Court and Court of Appeals here correctly recognized that, in light of the New Jersey Supreme Court's decision in this matter, there is no possible basis for assuming that the Board will overstep its legal bounds and intrude upon Shelton's religious affairs in the licensure process. It is of course true that, in making its licensure determinations, the Board will be called on to make judgments about the educational sufficiency of religious schools like Shelton as well as secular ones. This fact, however, does not demonstrate that the licensure regulations excessively entangle the Board in religion any more than it does infringement on the free exercise of religion. There is nothing in the record nor in the licensure scheme itself to support Shelton's apparent belief that the Board will use its regulations to advance or impede essentially religious goals, in violation of the Establishment Clause. Petitioners' claim in this regard therefore raises no issue worthy of review by this Court.

C. The Petition for Certiorari Should Be Denied Because the District Court and Court of Appeals Erred in Retaining Jurisdiction Over this Matter.

If the record in this case suggests any error at all, it lies in the retention of jurisdiction over this matter by

the District Court and Court of Appeals after the final judgment of the New Jersey Supreme Court against Shelton College. The decisions of this Court leave no doubt that, from that point forward (if not before), the federal courts should have abstained, because petitioners were seeking nothing more than to have those courts overturn a valid state court judgment. *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 609 (1975) (cautioning against "[f]ederal post-trial intervention, in a fashion designed to annul the results of a state trial"); *cf., Wooley v. Maynard*, 430 U.S. 705, 711 (1977) (plaintiff who had previously been convicted of violating certain state statutes was not barred from bringing subsequent federal action challenging constitutionality of the statutes because he did not "seek to have his record expunged, or to annul any collateral effects those convictions may have"); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931 (1975) (*Younger* does not bar individuals who are not parties to a pending state prosecution from commencing a federal suit challenging the constitutionality of state statutes, but the federal court cannot issue any relief that would "directly interfere" in the ongoing state prosecution.)

If petitioners wished to obtain review by this Court of the state court judgment requiring Shelton to obtain a license to issue degrees, the proper course would have been to seek a writ of certiorari to the New Jersey Supreme Court following its decision. As it is—and as Judge Rosenn's well-reasoned dissent from the first decision of the Third Circuit herein makes clear (A126-A160)—petitioners have already been afforded review of their constitutional claim by two courts more than normal rules of federal jurisdiction would allow them. The District Court

in its final decision noted, perhaps ironically, "This case has run a long course." (A21). Petitioners have raised no meritorious reason why this Court should extend that course now.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,
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DATED: November 27, 1984